

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROY BLACKMON,

Defendant-Appellant.

UNPUBLISHED

September 14, 2001

No. 219350

Wayne Circuit Court

LC No. 98-005154

Before: Hoekstra, P.J., and Talbot and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317, two counts of assault with intent to do great bodily harm, MCL 750.84, and use of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to forty to sixty years' imprisonment for the second-degree murder conviction, three to ten years' imprisonment for each assault conviction, and two years imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

This case arises from a shooting incident which resulted in the death of one bystander and injury to two other bystanders. Throughout the proceedings, the prosecution advanced a theory that the shooting was related to gang activity. The prosecution argued to the jury and elicited testimony from witnesses regarding defendant's alleged gang association. Defendant denied any involvement in the incident and stated that he was at home at the time of the shootings.

On appeal, defendant argues that the trial court erred when it allowed the prosecutor to elicit irrelevant and prejudicial testimony about defendant's alleged affiliation with the Schoolcraft Gang. Defendant contends that the evidence lacked a factual basis and was contrary to the witnesses' testimony. The various theories of admissibility which were offered were identification, witness bias as it relates to threats of retaliation, and motive. Over defense counsel's repeated objections, the trial court admitted the evidence. Defendant contends that the prosecution engaged in misconduct by eliciting such testimony and also by extracting hearsay statements and questioning defendant about the credibility of witnesses.

We review a trial court's evidentiary ruling for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the court acted, would say there was no

justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We review occurrences of prosecutorial misconduct case by case, by examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "No reversal is required for a preserved, nonconstitutional error "unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), quoting *Lukity*, *supra* at 496.

Evidence of gang affiliation has been treated cautiously because of its inherently prejudicial nature. See *People v Ho*, 231 Mich App 178, 183-184; 585 NW2d 3387 (1998); *People v Wells*, 102 Mich App 122, 129-130; 302 NW2d 196 (1981). Evidence of defendant's alleged association with the Schoolcraft Gang was not necessary to establish identity. In each instance, the prosecution had already identified defendant with reliable testimony. Michael Hearn testified that he had known defendant for a "couple years" from living in the neighborhood. Arthur Anderson testified that he had attended high school with defendant. Jimmy Crost testified that he had been friends with defendant for three years. It was only after such testimony was elicited that the prosecution asked questions about gang affiliation and the Schoolcraft Gang. Identification was not a proper basis for admission of this evidence. In light of the prior testimony establishing identity, the prejudicial effect of references to gang affiliation substantially outweighed any probative value. MRE 403; *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Nor was the evidence of gang association properly admitted to show witness intimidation. "A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). The witnesses gave various reasons for their reluctance to testify. Many of them indicated that they felt intimidated by the prosecution or that the police had coerced them to testify against defendant. The testimony revealed that the majority of witnesses were not intimidated by defendant. In light of the witnesses' testimony and absence of any factual basis to suggest that the shooting was gang-related, the probative value of testimony about the Schoolcraft Gang was substantially outweighed by its prejudicial effect.

Further, we reject the prosecution's argument that evidence of defendant's membership in the Schoolcraft Gang was relevant to establish motive. The prosecution advanced the theory that the shooting occurred because defendant came to the aid of a fellow gang member, Jimmy Crost. Crost denied that he or defendant were members of a gang. Further, the evidence adduced at trial suggests that the altercation resulted from a domestic situation of Crost having visited Kenyatta Simons' girlfriend, Nancy Ellis. Nancy testified that Simons threatened to harm Crost and that Crost made a telephone call asking to be picked up because of some trouble. Hearn testified that defendant arrived and spoke to Crost, and then fired several shots, two of which hit Hearn who was standing near Simons. Although the evidence showed a connection between defendant and Crost which would explain defendant's presence at the scene to assist Crost, the record is void of any evidence that the shooting was in any way gang related. Accordingly, evidence regarding defendant's alleged association with the Schoolcraft Gang was unfairly prejudicial and merited exclusion under MRE 403.

We also conclude that the prosecution's repeated elicitation of such testimony and argument to the jury in the absence of a factual basis to support its theory constituted prosecutorial misconduct. The prosecution elicited testimony from one of the victims, Tiffany Smith, about her discovery of the words "R.I.P. Tiffany" and "Schoolcraft Gang" written on a playground slide. In closing argument, the prosecution maintained that this case was about gang activity: "I don't know anything about this gang stuff and I can be naïve. That's in this case. That's what this case is about." The prosecution also argued that the witnesses were scared to testify because of defendant's gang affiliation. The prosecution's theory was unsupported by the evidence and contrary to the witnesses' testimony that they were not afraid to testify against defendant.

We also conclude that the prosecution committed misconduct when he impeached his witness, Tiffany Goggans. Goggans did not see the shooting. She did not see or hear the events that precipitated the shooting. Goggans had no knowledge of the relationship between defendant and Crost. Goggans testified at trial that Adrienne Ellis did not tell her the name of the shooter. In an earlier statement, Goggans had stated that Adrienne told her the shooter was defendant. The impeachment of Goggans' credibility with this statement was improper because the "the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and [] there is no other testimony from the witness for which [her] credibility was relevant to the case." *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997); *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). Additionally, we agree with defendant that the prosecution improperly questioned defendant about the credibility of other witnesses. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). However, defendant did not request a limiting instruction and the trial court was not required to give one sua sponte. *Id.*

Notwithstanding the instances of prosecutorial misconduct and the erroneous admission of gang evidence, we conclude that reversal is not required. In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *Lukity, supra* at 495-496. "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000); *Lukity, supra* at 495-496. "In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *Rodriguez, supra* at 474, quoting *Elston, supra* at 766. See *Lukity, supra* at 495.

In this case, the untainted evidence against defendant was overwhelming. Hearn testified that he saw defendant "turn[] and start[] shooting." Anderson testified about defendant, "I saw him shoot." Hearn's and Anderson's eye-witness testimony alone would support a conviction of the crimes charged. Given the strong evidence of defendant's guilt we are confident that the improper admission of gang affiliation and prosecutorial misconduct did not undermine the reliability of the verdict and was therefore not outcome determinative. *Elston, supra* at 766-767.

Defendant next argues that he was denied a fair trial when the trial court refused to disqualify a juror who asked to be excused early after “sentencing” before defendant had presented proofs. Defendant maintains that the juror’s request indicated that she had prejudged the case, and therefore the trial court erred in not removing the juror. We disagree. A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). The trial court’s decision whether to disqualify a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). See also *People v Johnson*, 164 Mich App 634, 637-639; 418 NW2d 117 (1987), rev’d on other grounds 432 Mich 931; 442 NW2d 625 (1989).

The trial court determined after questioning the juror that she did not understand the significance of the legal term “sentencing” and that she merely requested to be excused early after completing her service. The juror stated that she used the term “sentencing” by mistake because she did not understand and she repeatedly asserted that she had not prejudged the case. Accordingly, we find no abuse of discretion of the trial court’s decision not to remove the juror.

Finally, defendant argues that his sentence of forty to sixty years’ imprisonment for the second-degree murder conviction violates principles of proportionality because the greatest recommended sentence under guidelines is twenty-five years. We disagree.

“A court may justify an upward departure from the sentencing guidelines by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines.” *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). The court noted the random nature of the shooting and the fact that the three victims were innocent bystanders. The court found it reprehensible that one of the victims was a ten-year-old girl who was on her bicycle at the time of the incident. She and Hearn will live the rest of their lives with bullets in their bodies. Although the trial court’s departure from the guidelines was considerable, we conclude that its reasons for doing so were adequately supported by the record. *Castillo*, *supra* at 448.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly